SERVED: November 18, 1992

NTSB Order No. EA-3724

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of October, 1992

RICHARD PINE, WILLIAM TER KEURST, JR., Applicants, v. THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Respondent.	Docket No. 83-EAJA-SE-8920

OPINION AND ORDER

The applicants have appealed from the decision and order[1] issued by Administrative Law Judge William A. Pope, II on July 18, 1989, denying the application for attorney fees and other expenses under the Equal Access to Justice Act, as amended, 5 U.S.C. §504 (EAJA) and the Board's Rules implementing that act,

[1]A copy of the decision and order denying the application for attorney fees and costs is attached.

49 C.F.R. Part 826. In his decision, the law judge concluded that the Administrator was substantially justified in filing the complaints against the applicants. For reasons set forth below, we believe there was insufficient information in the record to determine whether the Administrator was substantially justified in prosecuting this case against the applicants. Therefore, consistent with section 826.36(a) of our rules implementing the EAJA, we remand the case to the law judge for further proceedings.[2]

An exposition of the facts culminating in this EAJA claim is warranted. As to Applicant Pine, the Administrator's complaint alleged, in pertinent part:

> "1. At all times material herein you were and are the holder of Mechanic Certificate No. 1410169 with airframe and powerplant ratings and inspection authorization.
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> 2. On or about October 25, 1985, you a) reinstalled the main rotor head assembly of civil aircraft N2047R, a Bell 206B helicopter after overhaul; b) performed a 600 hour inspection of N2047R and approved the aircraft for return to service as airworthy.
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> 3. On or about May 1, 1986, you performed an annual inspection of N2047R and approved the aircraft for return to service as airworthy.

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[2]Section 826.36(a) states:

> "§ 826.36 Further proceedings.
>
> (a) Ordinarily the determination of an award will be made on the basis of the written record; however, on request of either the applicant or agency counsel, or on his or her own initiative, the administrative law judge assigned to the matter may order further proceedings, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application and shall be conducted as promptly as possible."

> 4. At the time of the reinstallation and each inspection and approval for return to service, N2047R was equipped with main rotor hub assembly, serial number GDLM12371; part number 206-011-100-21.
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> 5. At the time of the reinstallation and inspections and approval for return to service N2047R was not in airworthy condition in that main rotor hub assembly GDLM12371 was not approved for installation on N2047R in that its part number was lower than 206-011-100-127.
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> 6. On or about February 26, 1987, you reinstalled main rotor hub assembly GDLM12371 on N2047R after overhaul, performed an annual inspection and approved N2047R for return to service as airworthy when it had installed on it the unapproved main rotor hub assembly."[3]

The complaint against Applicant Ter Keurst alleged that he inspected N2047R on October 25, 1985, and July 3, 1986, each time determining that the aircraft was airworthy. According to the complaint, N2047R was not airworthy due to the installation of the unapproved part in the main rotor hub assembly.[4] Both applicants filed answers denying the charges.

On February 2, 1989, the applicants filed a Motion to Dismiss a Stale Complaint, stating that the alleged violations occurred more than six months before the Administrator notified them of the impending certificate actions.[5] Because the Administrator never responded, they filed a second motion on

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[3]Pine was charged with violating sections 43.13(b) and 43.15(a)(1) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 43).

[4]Ter Keurst was charged with violating section 43.15(a) of the FARs.

[5]See section 821.33 of the Board's Rules.

February 20. Again, the Administrator did not reply.[6] As a consequence, Administrative Law Judge Thomas W. Reilly dismissed the complaints by order dated February 27, 1989.[7] The applicants thereafter sought $2,130.00 in fees and expenses under the EAJA. Administrative Law Judge Pope denied their application, finding first that the dismissal of the complaints as stale did not per se entitle the applicants to fees and expenses under the EAJA.[8] He also determined that the Administrator had a reasonable basis

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[6]In his EAJA reply brief, the Administrator explained that due to a misunderstanding after the hearing had been postponed, he believed a written reply to the applicants' motion was unnecessary. Our decision here should not be interpreted as accepting the Administrator's excuse for failing to file a timely answer.

[7]According to the complaints, the violations occurred on October 25, 1985, May 1, 1986, and July 3, 1986. The Administrator contends that the violations were discovered through inspections conducted on September 27, 1987, and October 29, 1987, but offered no proof of this claim. Both certificate actions commenced on November 30, 1987.

We think it unlikely that the motion to dismiss for staleness would have been granted had this information been substantiated and timely presented to the law judge in a responsive pleading. See precedent cited in n. 10, infra. In any event, the Administrator did not appeal from the grant of that motion. On remand, evidence of the dates when the aforementioned violations were discovered should be produced so that the law judge can determine whether the Administrator's prosecution of complaints facially stale under the Board's rules was substantially justified.

[8]We agree with the law judge's statement that

"[t]he granting by the administrative law judge of Respondent[s'] Motion to Dismiss Stale Complaint does not demonstrate per se that the FAA was not substantially justified in bringing the complaints. That determination must be made on the basis of the information available to the FAA at the time it filed the complaints."

Initial Decision and Order at 4.

in law and fact for issuing the complaints. In reaching this conclusion, the law judge utilized Pine's response to the Administrator's interrogatories.[9] He noted that, according to the pretrial pleadings (namely, Pine's response to the Administrator's interrogatories), the applicants did not dispute that the rotor head reinstalled on the helicopter was unauthorized, or that they had certified the helicopter as airworthy. Initial Decision at 4. This, he deemed, constituted sufficient proof that the Administrator initiated the action against the applicants with substantial justification.

In their appeal, the applicants claim that the law judge erred by denying their EAJA request. They maintain that since the claim was dismissed as stale,[10] it may be inferred that the

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[9]Pine's response to the FAA's interrogatories stated that he was expected to testify to

> "[t]he fact that Respondent was ordered by the FAA to overhaul the rotorhead; the aircraft rotorhead was certified with this component by both Bell Helicopter Textron and crescent [sic] Airways; that there was no way of knowing by the manuels [sic] that it was not the proper rotorhead.
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> That the subject rotorhead can be used on the same aircraft with the same powertrain with the only difference being a lower serial number airframe and that the rotorhead was not in any way unairworthy."

While Pine's response stated that Mr. Ter Keurst, Jr. was "expected to testify that the rotorhead was overhauled persuant [sic] to the manuel [sic] and that there was no way of knowing that it was an improper rotorhead," Ter Keurst himself filed no response. Consequently, whatever the propriety of using these interrogatories as "evidence" in the EAJA proceeding, they were insufficiently broad to be dispositive as to both parties.

[10]A complaint is not automatically considered stale simply because a respondent received notice more than six months after the alleged offense occurred. For example, in Administrator v.

Administrator lacked substantial justification in prosecuting this action against the applicants.[11] This reasoning is faulty.

The intent of Congress in enacting the EAJA was "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." I.N.S. v. Jean, 110 S.Ct. 2316, 2321 (1990). The key inquiry thus becomes whether the government's actions were unreasonable. In order to make this determination, the case must be looked at as a whole.[12] It would be inconsistent with the purpose of the EAJA to assume, without evaluating the case in its entirety, that because the complaints were dismissed as stale, the Administrator must have commenced the action without substantial justification. There is no provision in the EAJA for an automatic award of fees and costs in each case that is dismissed on procedural grounds.[13]

(..continued)
Winrow, 4 NTSB 1577 (1984), more than six months had passed from the time the incident occurred until the notice of certificate action was sent to the respondent. Only two and a half months, however, had passed between the time when the Administrator became aware of the violations, and when he notified respondent. The Board refused to dismiss the complaint as stale. See also Administrator v. Marshall, 4 NTSB 1079, 1080 (1983)("the Administrator is allowed to establish good cause for a delay beyond the 6-month period where he is not informed or becomes aware of the alleged violations until well after they have occurred").

[11]The applicants make several other arguments, all of which we have considered and determined do not warrant discussion.

[12]The Court stated that when determining whether the government was substantially justified, "the EAJA--like other fee-shifting statutes--favors treating a case as an inclusive whole, rather than as atomized line-items." I.N.S. v. Jean, 110 S.Ct. at 2320.

[13]This does not mean, however, that procedural error may never be the basis for finding that the government's position was

Under the EAJA, if a government agency cannot prove that its position was substantially justified or that special circumstances make an award of attorney fees and expenses unjust, the agency is required to pay attorney fees and other costs to a prevailing applicant.[14] 5 U.S.C. § 504(a)(1). To prove substantial justification, there must be, among other things, "a reasonable basis in truth for the facts alleged in the pleadings." See McCrary v. Administrator, 5 NTSB 1235, 1238 (1986). To fairly evaluate whether such a basis exists, some information attesting to this truth must be submitted to the deciding tribunal.

The Administrator asserts in his reply brief that he proceeded against the applicants based on the following: the main rotor head assembly of civil aircraft N2047R had part number 206-011-100-21; this number was lower than the part number approved for installation on the aircraft; the installation of an unapproved part rendered the aircraft unairworthy; the aircraft's log book was signed by both Mr. Pine and Mr. Ter Keurst, attesting that they overhauled and/or inspected the main rotor head and returned the aircraft to service; Applicant Pine stated in his response to the Administrator's interrogatories that he overhauled the rotor head and the aircraft was airworthy.

(..continued)
not substantially justified.

[14]We intimate no view on the correctness of the law judge's apparent conclusion here that a party whose case is terminated as the result of a procedural default can properly be deemed a "prevailing party" under the EAJA.

The Administrator's allegations, assuming they could be substantiated, may amount to substantial justification. Bald assertions dispersed throughout the Administrator's brief, however, without any basis in the record to support them, provide an insufficient basis upon which to ground an EAJA decision. The law judge should have given the Administrator an opportunity to produce some documentation for his claims, as the record lacked sufficient development for evaluating the strength of the Administrator's case. For example, no information was provided to support the Administrator's claim that the lower part number was not approved for installation. At the bare minimum, the Administrator should have been allowed to make a proffer as to the evidence he expected to present had the case proceeded to hearing.[15] Argument alone cannot be considered sufficient proof of substantial justification.

Based on the foregoing, we conclude that a proper assessment of the EAJA application cannot be fairly made without additional information regarding the basis for the allegations and, as well, on the matter of due diligence prompted by the Administrator's prosecution of complaints found to be stale under our rules of practice.

[15]Although the necessity for such a proffer arguably should have been evident to counsel for the Administrator when his answer to the EAJA application was filed, counsel appears to have been preoccupied with an attempt to demonstrate that the failure to respond to the stale complaint motion was inadvertent and excusable.

ACCORDINGLY, IT IS ORDERED THAT:

1. The initial decision is vacated to the extent it denied the application for an EAJA award; and

2. The case be remanded to the law judge for further proceedings consistent with this opinion and order, and for a new decision on the application following the supplementation of the record.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.